Supreme Court, U.S.
FILED
APR -7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-124

In The
# Supreme Court of the United States
October Term, 1988

LYNN BREININGER,

*Petitioner,*

vs.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6,

*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## JOINT APPENDIX

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**Petition for Certiorari Filed July 20, 1988**
**Certiorari Granted February 21, 1989**

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Not separately printed herein. See Appendix D, p. A12 to Petition for Writ of Certiorari to United States Court of Appeals for the Sixth Circuit filed July 20, 1988

## UNITED STATES DISTRICT COURT DOCKET

0647 83 1126 12 13 83 3 790 1

Nearest $1,000/150 J 4714 M 88888 P 83 1126 Jury

PLAINTIFF
BREININGER, LYNN L.

DEFENDANTS
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION Local Union No. 6

CAUSE

(Cite the U.S. Civil Statute Under Which the Case is Filed and Write a Brief Statement of Cause)

29:151, 158 & 159(b)—Labor Mgmt. Relations Act

Unfair representation

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☐ Check Here If Case Was Filed in Forma Pauperis

FILING FEES PAID

| Date | Receipt Number | C.D. Number |
|---|---|---|
| 12-13-83 | # Illegible | |

STATISTICAL CARDS

| CARD | DATE MAILED |
|---|---|
| JS-5 | Jan. 3, 1984 |
| JS-6 | Mar. 2, 1987 |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 12/13/83 | 1 | COMPLAINT with Jury Demand filed. SUMMONS issued to atty. |
| 2/ 3/84 | 2 | ANSWER filed. Mld. |

| DATE | NR. | PROCEEDINGS |
|---|---|---|
| 4/ 3/84 | 4 | 1ST. AMENDED COMPLAINT with Jury Demand filed. Mld. |
| 4/ 5/84 | 5 | ANSWER to 1st Amended Complaint filed. Mld. |
| 9/10/86 | 23 | MOTION of deft. for summary judgment and/or strike jury demand filed. Mld. 58 pp. |
| 11/19/86 | 24 | DEPOSITION of Michael Duffey filed. |
| 11/19/86 | 25 | DEPOSITION of David Williams filed. |
| 11/24/86 | 26 | OPPOSITION of pltf. to motion filed 9/-0/86 with exhibits filed. Mld. VL (2 Volume) |
| 11/26/86 | 27 | AFFIDAVIT of Lynn L. Breininger (as exhibit "D" which pertains to opposition filed 11/24/86). 2 pp. VL |
| 12/11/86 | 28 | DEPOSITION of Lynn L. Breininger filed. |
| 2/20/87 | 29 | OPINION & ORDER filed. NJW. Deft. Union's motion summary judgment granted. Pltf.'s complaint dismissed. 8pp. DW |
| 2/23/87 | 30 | JUDGMENT filed. NJW. Deft. Union's motion for summary judgment granted. Pltf.'s complaint dismissed. Copies mld. 1 pg. DW |
| 3/10/87 | 31 | NOTICE OF APPEAL: of pltf. filed. Copies by clerk to: Landry, Julius, on 3/10/87. BP |



GENERAL DOCKET

U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appeal from: OHN-Tol Record location: 14-11-E

Title of Case

Lynn L. Breininger,

Plaintiff-Appellant,

vs.

Sheet Metal Workers International Association, Local Union No. 6,

Defendant-Appellee.

See Page 3 for any additional title

( ) Crim ( ) Rule 35 ( ) M.V. 2255
( ) H.C. 2254 ( ) H.C. 2241 ( ) Grand Jury
( ) C.R. Otr. ( ) Civ. Otr. (X) Fed. Ques.
( ) Div. ( ) S.S. ( ) C.R. Pris. ( ) C.R. School
( ) C.R. Title VII ( ) Civ. U.S. ( ) Agcy.
( ) Tx. Ct. ( ) Bk. ( ) Mand-Pris.
( ) Mand-Otr. ( ) 1292(b) ( ) Otr.

Fee (X) Paid ( ) IFP ( ) CJA ( ) GOV.

District Court Data

Dist. Docket No. C 83-1126

Dist. Judge—N. Walinski

Date of Judgment: 02-23-87 Date NOA filed: 03-10-87

Case No. 87 3224

Attorneys for Appellant
Cross Appeal No.

( ) Consolidated ( ) Related ( ) Prior

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Short Title

Breininger v. Sheet Metal Workers

Additional title, counsel, or comments about page 2:

Case No. 87-3224

| Date | | FILINGS-PROCEEDINGS |
|---|---|---|
| 1987 | | |
| 03/13 | 01) | NOTICE OF APPEAL, filed ns |
| 03/13 | 02) | LETTER—case opening [forms due 03/27] ns |
| 03/23 | 03) | APPEARANCE Of J. Julius for appellees jmb |
| 03/25 | | *CERTIFIED RECORD*, filed (02 plea; 03 dep) [NB] ns |



| Date | | FILINGS-PROCEEDINGS |
|---|---|---|
| 03/26 | 04) | APPEARANCE of F. J. Landry for appellant jmb |
| 03/26 | 05) | PRE-ARGUMENT STATEMENT from appellant jmb |
| 03/26 | 06) | TRANSCRIPT ORDER from appellant, trans. unnecessary jmb |
| 04/03 | 07) | LETTER—briefing (5/18; 6/22; 7/9; 7/16) ns |
| 05/18 | | BRIEF/APPELLANT (10) (m-5/15) pje |
| 06/05 | 08) | MOTION/APPELLEE ext to 7/6 to file brief (m-6/4) pje |
| 06/08 | 09) | LTR: RULING/GRANTING ext to 7/6; repl to 7/20; ja due 7/27 (JPH/bb) pje |
| 07/06 | | BRIEF/APPELLEE (10) (m-7/3) pje |
| 07/20 | | REPLY BRIEF/APPELLANT (10) (m-7/17) pje |
| 07/27 | | JOINT APPENDIX (5) (m-7/24) bb |
| 11/20 | 10) | LETTER: to counsel; oral argument sched. for 1/11/88. jmb |
| 1988 | | |
| 01/11 | | CAUSE argued by Landry for appellant, by Roca for appellee and case submitted to the Court (Before: Engel, Kennedy and Krupansky, JJ.) gm |
| 01/11 | 11) | APPEARANCE of J.M. Roca for appellee jmb |
| 03/01 | 12) | JUDGMENT: affirmed by per curiam opinion (Engel, Kennedy and Krupansky, JJ.) (Published) gm |
| 03/15 | 13) | PETITION FOR REHEARING by appellant (m-3/14) mdm |

04/22 14) ORDER: petition for rehearing (#13) denied (Engel, Kennedy, and Krupansky, JJ.) gm

05/02 15) MANDATE issued (No costs taxed) gm

05/23 16) MOTION/NON-PARTY (IBEW): for publication of Court's decision herein on 3/1/88 (m-5/20/88) gm

05/31 17) JOINER IN MOTION: publications of Court's 3/1/88 decision (m-5/27/88) gm

06/09 18) MOTION/APPELLEE: for publication of Court's 3/01/88 decision with memo in support (m-6/8/88) gm

06/15 19) ORDER: motion for publication of Court's 3/1/88 decision (#18) granted (Krupansky, J.) gm

07/28 20) NOTICE of filing petition for certiorari (S. Ct. No. 88-124) 7/20/88 gm

1989

02/23 21) CERTIFIED copy of S. Ct. order granting certiorari 2/21/89 gm

02/23 Copy of #21 sent to D. Ct. gm



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| Lynn L. Breininger<br>Plaintiff | ) | Case No. C83-1126 |
| v. | ) | Hon. Nicholas J. Walinski |
| Sheet Metal Workers International Association Local Union No. 6<br>Defendant | ) | FIRST AMENDED ANSWER |

Now comes the defendant Sheet Metal Workers International Association, Local Union No. 6 (hereinafter referred to as the "Union") by and through its attorneys, the law office of Gallon, Kalniz & Iorio Co., L.P.A., and for its answer to the plaintiff's First Amended Complaint, numbering each paragraph of this answer to correspond to the paragraph of plaintiff's First Amended Complaint to which it is responsive, does state and aver as follows:

1. That defendant Union admits that plaintiff has attempted to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1331, § 1337, and § 1343(4); 28 U.S.C. § 2201 and § 2202; and, 29 U.S.C. § 151, § 158(b), and § 159; but, denies that jurisdiction is so properly invoked. Further, the defendant Union denies the remaining allegations of paragraph 1 of the plaintiff's First Amended Complaint.

2. That defendant Union admits that plaintiff has attempted to invoke the jurisdiction of this Court pursuant to 29 U.S.C. § 411, § 412, and § 529; but, denies that jurisdiction is so properly invoked. Further, the defendant

Union denies the remaining allegations of paragraph 2 of plaintiff's First Amended Complaint.

3. That defendant Union admits that plaintiff is a white male citizen of the United States and a resident of the City of Petersburg in the State of Michigan; and the plaintiff is and has been a member in good standing of defendant Union. Further, the defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff has been a member in good standing of defendant Union for approximately thirty-four (34) years up to the present time and of the collective bargaining unit described in paragraph 3, *infra*. Further, defendant Union denies the remaining allegations contained in paragraph 3 of the plaintiff's First Amended Complaint.

4. That defendant Union admits allegations contained in paragraph 4 of the plaintiff's First Amended Complaint.

5. That defendant Union admits that at all material times the Toledo Area Sheet Metal and Roofing Contractors Association and the Toledo Heating and Air Conditioning Contractors Association and the defendant Union have been signatory to collective bargaining agreements. Likewise, the defendant Union admits that the collective bargaining agreement cited by plaintiff speaks for itself at Article V. Finally, the defendant Union denies the remaining allegations contained in paragraph 5 of the plaintiff's First Amended Complaint.

6. That defendant Union denies the allegations contained in paragraph 6 of the plaintiff's First Amended Complaint.



7. That defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegations that plaintiff was laid off in November, 1982. Further, the defendant Union admits plaintiff's presence at the Enrico Power Unit Job No. 2657 was requested by Venderbush Industrial Corporation. Likewise, the defendant Union admits plaintiff was not referred to employment at the Enrico power Unit Job No. 2657 in a lawful, nondiscriminatory manner. Further, defendant Union denies remaining allegations contained in paragraph 7 of the plaintiff's First Amended Complaint.

8. That defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the plaintiff's First Amended Complaint.

9. That defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 of the plaintiff's First Amended Complaint.

10. That defendant Union denies the allegations contained in paragraph 10 of the plaintiff's First Amended Complaint.

11. That defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11 of the plaintiff's First Amended Complaint.

12. That defendant Union admits that plaintiff filed a charge under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Worker's International Association. Further, defendant Union denies the remaining alle-

gations contained in paragraph 12 of the plaintiff's First Amended Complaint.

13. That defendant Union denies the allegations contained in paragraph 13 of the plaintiff's First Amended Complaint.

14. That defendant Union realleges paragraphs 1-13 of this Answer as if fully rewritten herein.

15. That defendant Union admits that it conducted an election for officers in June, 1982. Further, defendant Union is without knowledge or information sufficient to form a belief as to the truth of the allegation that, "... in said election, plaintiff participated by handing out pencils advertising the former business manager, Don Reaume, and the former business agent, Bob Good". Finally, defendant Union denies remaining allegations contained in paragraph 15 of the plaintiff's First Amended Complaint.

16. That defendant Union denies the allegations contained in paragraph 16 of the plaintiff's First Amended Complaint.

17. That defendant Union denies the allegations contained in paragraph 17 of the plaintiff's First Amended Complaint.

18. That defendant Union denies the allegations contained in paragraph 18 of the plaintiff's First Amended Complaint.

19. That defendant Union denies the allegations contained in paragraph 19 of the plaintiff's First Amended Complaint.



20. That defendant Union denies each and every allegation of the plaintiff's First Amended Complaint not hereintobefore specifically admitted to be tru; and, further answering by way of partial or complete affirmative defense, do state and aver as follows:

## FIRST AFFIRMATIVE DEFENSE

21. That the plaintiff's First Amended Complaint fails to state a claim upon which relief can be granted.

## SECOND AFFIRMATIVE DEFENSE

22. That defendant Union realleges paragraph 1 through 21 of this Answer as if fully rewritten herein.

23. That this court lacks the requisite jurisdiction over the subject matter of plaintiff's First Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1).

## THIRD AFFIRMATIVE DEFENSE

24. That defendant Union realleges paragraph 1 through 23 of this Answer as if fully rewritten herein.

25. That plaintiff's First Amended Complaint was not filed within the requisite statute of limitations period.

## FOURTH AFFIRMATIVE DEFENSE

26. That defendant Union realleges paragraph 1 through 25 of this Answer as if fully rewritten herein.

27. That plaintiff failed to exhaust contractual and/or internal union remedies.

## FIFTH AFFIRMATIVE DEFENSE

28. That defendant Union realleges paragraph 1 through 27 of this Answer as if fully rewritten herein.

29. That defendant's actions or omissions do not constitute arbitrary, discriminatory or bad faith conduct.

## SIXTH AFFIRMATIVE DEFENSE

30. That defendant Union realleges paragraph 1 through 29 of this Answer as if fully rewritten herein.

31. That defendant Union's actions or omissions were not a breach of the duty of fair representation under the provisions of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185.

## SEVENTH AFFIRMATIVE DEFENSE

32. That defendant Union realleges paragraph 1 through 31 of this Answer as if fully rewritten herein.

33. That the allegations of plaintiff's First Amended Complaint are preempted by the provisions of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 151 at *et. seq.*

WHEREFORE, the defendant Union demands judgment as follows:

A. that this Court dismiss the plaintiff's First Amended Complaint and order that the plaintiff take nothing.

B. that this Court grant the defendant Union the costs of this action, including reasonable attorney's fees.



C. that this Court grant defendant Union any and all other relief to which it deems the defendant entitled.

Respectfully submitted
GALLON, KALNIZ & IORIO, Co., L.P.A.
By Jeffrey Julius

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing First Amended Answer was mailed this — day of April, 1984 to Francis J. Landry, attorney for plaintiff, 300 Inns of Court Building, 405 N. Huron St., Toledo, OH 43604.

United States District Court
for the Northern District of Ohio
Western Division

Deposition of Lynn Breininger
R.28 Dated June 13, 1984

• • •

(p. 27) A. Yes.

Q. And how did you become familiar with that?

A. Well, through Union meetings and discussing it and letters and such.

Q. Could you explain your understanding of the way a Union member or Union members can get a job working for sheet metal contractors under the jurisdiction of Local 6?

A. Well, you can get it through the Union Hall, your own work.

Q. Through the Union?

A. You can get it through the Union Hall. You also can go out and solicit your own work.

Q. And when you talk about going through the Union, is that using the referral procedure that the Union provides?

A. Well, I would say so, yes. It's not necessarily always that way, though.

Q. That's your claim; correct?

A. Right.

Q. Before we talk about your claims specifically, it's my understanding that the Union maintains what's known as an out-of-work list?

• • •

(p. 85) I was not sent. She was pretty quick on the answer. She said that it was a contract dispute and that



they didn't handle that. I told her at the time that I had a lawyer, and she said, in other words, tell him. I mean not tell him, that he would know this, that if there is any question, that I should just ask him, that he would automatically know this, and that was it.

Q. Was that your first and only contact then with the Labor Board?

A. Right.

Q. In going back then after receiving what has been marked as Defendant's Exhibit 7a, and that's the July 21, 1983 letter from the International, did you have any contact with any representative of the International?

A. No.

Q. Did you talk to Malcolm Hamilton?

A. I talked to Malcolm Hamilton after this letter.

Q. Do you recall the date you talked to him on?

A. No, but I think I have that at home. I think I seen that at home. I met him at the Holiday Inn out on Reynolds Road.

• • •

(p. 145) Q. The Bechtel job was Fermi; correct?

A. Right.

Q. When did that job run, begin, and has it ended?

A. It hasn't ended yet. It was going, I believe, '80 or '81. It will show you on that one list. I seen a date there of out-of-work list of '81 or '80.

Q. I think that's marked B 11 is how it was marked.

A. 11/23/81, that was one there. Here's from 9/22/80 the job started on one of them there. It may have started earlier than that even.

Q. You are alleging there have been times when the list has been jumped with respect to the Bechtel project also; correct?

A. Right.

Q. Do you have specific individuals that you know about that you're alleging jumped the list?

A. Right here, if you want to go through it. It spells it out, when they were hired and when they were terminated. This fellow, for instance, has worked there five times.

Q. And do you know whether he's been recalled by name?

A. Do they have any referrals?

(p. 146) Q. Well, I'm asking you whether you know.

A. He has to be called by a name to get back there.

Q. Have you worked on the Bechtel project at all?

A. No.

Q. Do you know whether the Union has negotiated a provision that requires Bechtel to recall people in the order that they laid them off?

A. I don't believe so, because the way they have it for hiring is a letter of request which they got in to our



Union before they took power, and everybody else that goes to a job has to have a letter of request. When you worked for somebody and you're laid off, in order to go back again, you should have a letter of request. There's no letters of request in their records.

Q. Now, are there any individuals right now that you can name that you feel have jumped the list at Bechtel?

A. Oh, yes, if I can look over this slip here.

Q. Please do.

A. Well, we'll do it together.

Q. You have pointed to an individual on B 11; is that correct?

• • •

(p. 152) Q. Blakeman, B-l-a-k-e-m-a-n maybe. He is the one right in the middle with a hundred and sixteen by his name?

A. Right.

Q. And you're claiming him also; correct?

A. I would think so the way the dates are, and Edward Palmer and Randy Lindhorst.

Q. L-i-n-d-h-o-r-s-t, I think.

A. Dave Allen. No. He hired one day and got laid off the next day, apparently. We can't count him. He didn't get ten consecutive days. That's confusing here. Charles Fisher.

Q. You have named the majority of the people on Defendant's Exhibit B 11; is that correct?

A. Pardon?

Q. You've named a majority of the people on Defendant's Exhibit B 11?

A. Right.

Q. Is it your claim that all of those persons are members of this "Concerned Brothers" and that's why they're referred before you?

A. Not all of those people are. A majority of them are.

• • •

(p. 154) A. Right. The other group on the other side isn't working.

Q. So you're saying that there are two groups within the Union?

A. Correct.

Q. And you can name who's on one side and who's on the other side?

A. Well, I can't name each and every one of them, but it is very obvious if you could attend a meeting.

Q. And you feel that anybody that supports the administration or who makes a showing supporting that administration is treated differently?

A. I would say, yes.

Q. And that's based upon what?

A. Well, who is working and who isn't working.

Q. And have you ever been told by anybody that if you would support the administration, you'd work more?



A. No, because they knew my opinion of them before they went into office.

Q. Your opinion about what?

A. Well, way of doing business, way of running a Union Hall.

• • •

(p. 159) A. The fact itself is the copy of the letter and they never called me to go to the job. I was there the 10th and asked why I wasn't sent. The business agent blamed it on the business manager. Four days or three days after that, the business manager blamed it on the business agent. So, I mean, they said they called and Venderbush said it was perfectly all right, they could send somebody else, and it's not so.

Q. And the people that were sent to the job rather than you, and that's the Venderbush job, do you know who they were?

A. It was Joseph Nunley.

Q. And is Joe Nunley a member of the "Concerned Brothers"?

A. Yes, I would say so.

Q. Do you know for sure?

A. Yes.

Q. And how do you know that?

A. Well, he just proposed to have a professional hiring hall, in other words, for our Local instead of the present system that we have.

Q. A professional or an exclusive?

A. Well, he named it professional. There was nothing

• • •

(p. 181) an election of business manager and business agent. In said election, Plaintiff participated by handing out pencils advertising the former business manager, Don Reaume, and the former business agent, Bob Good; see that?

A. Yes.

Q. On how many occasions did you hand out pencils for Don Reaume and Bob Good,

A. Well, I had a bunch of them. I don't know how many occasions it would be, but during election time it was probably the main time.

Q. Who did you hand them out to?

A. Anybody that took one.

Q. Would you go to different job sites and hand them out?

A. Oh, no, no. That didn't happen, no.

Q. How would you go about handing it out? I guess I'm confused.

A. Well, when they have an election, right there is the door; simple as that.

Q. You're saying on the date of the actual balloting?

A. Right.

Q. You stood outside the Union Hall?



(p. 182). A. Right, or wherever you was around or wherever you were at and a Union member is there, have one in your pocket and you give it to him.

Q. And did you specifically hand it out outside the Union Hall on election day? I'm talking about you personally.

A. You mean handed out pencils other than at that—I just said say there'd be somewhere where I would run across somebody, give it to him.

Q. In other words, when you'd run into a Union member whether on a job site or someplace else, you'd give them one of these pencils?

A. Right.

Q. Did you personally stand outside the Union Hall on election day, and I'm talking about the election of the officers, and hand out pencils?

A. Right.

Q. You did?

A. Yes. In fact, they went pretty fast.

Q. And on that day, did you see Dave Williams or Mike Duffey?

A. I didn't see Dave Williams, but I seen Mike Duffey.

Q. Did you have a conversation with him?

• • •

———

Exhibit B-11 to Deposition of Lynn Breininger

AFTER DUFFEY (illegible) 1982

| BECHTEL | | | HIRED | TERMINATED |
|---|---|---|---|---|
| SM-01 | Wilbur Scheich | | 9-22-80 | 3- 3-83 |
| | | x | 3-14-83 | 6-21-83 |
| | | x | 6-29-83 | 8-19-83 |
| 07 | Craig Ranik | | 10- 1-81 | 1-21-83 |
| | | x | 4- 8-83 | 10-14-83 |
| 11 | Allen Hoover | | 11- 2-81 | 4-13-82 |
| | | | 11-22-82 | 3- 3-83 |
| | | x | 3-14-83 | 6-10-83 |
| | | (illegible) | | |
| | | (illegible) | | |
| 18 | Michael Myers | | 11-16-81 | 9- 8-82 |
| | | | 10- 5-82 | Still working |
| 19 | Jerry Brown | | 11-16-81 | 4-13-82 |
| | | | 10- 5-82 | 3- 3-83 |
| | | x | 3-14-83 | 3-29-83 |
| | | x | 5- 2-83 | 6-21-83 |
| | | x | 6-30-83 | 9-28-83 |
| 23 | Oscar Manquis | | 11-23-81 | 3-12-82 |
| | | x | 4- 4-83 | 6-10-83 |
| | | x | 7- 8-83 | 9-28-83 |
| 24 | Elwood Shannon | | 11-23-81 | 9- 8-82 |
| | | | 10- 5-82 | Still working |
| 25 | Ralph Thornton | | 11-30-81 | 12- 1-81 |
| | | | 1-25-82 | 4-13-82 |
| | | | 10-11-82 | 1-20-83 |
| | | x | 4- 8-83 | 9-25-83 |
| 32 | Donald Turner | | 1-11-82 | 1-21-83 |
| | | x | 3-14-83 | Still working |
| 35 | Richard Wilder | | 1-11-82 | 4-13-82 |
| | | | 10-12-82 | 6-22-83 |
| | | x | 6-30-83 | Still working |
| 42 | Richard Buck | | 1-25-82 | 4-13-82 |
| | | x | 1-10-83 | 3- 3-83 |
| | | x | 3-14-83 | 6-21-83 |



| BECHTEL | | | HIRED | TERMINATED |
|---|---|---|---|---|
| 43 | Jerry Cravens | | 1-28-82 | 1-29-82 |
| | | | 1-10-83 | 2-10-83 |
| | | x | 4-11-83 | 10- 7-83 |
| 52 | Clarence Mead | | 2-15-82 | 3- 3-83 |
| | | x | 3-18-83 | 9-28-83 |
| 77 | Arvid Steiff | | 2-15-82 | 3-12-82 |
| | | | 11-22-82 | 5-13-83 |
| | | x | 6-30-83 | 11- 4-83 |
| 89 | John Pendeau | | 11-22-82 | 6-15-83 |
| | | x | 6-29-83 | 8- 5-83 |
| 91 | Carl Steward | | 11-22-82 | 3- 3-83 |
| | | x | 3-14-83 | 6-22-83 |
| | | x | 6-30-83 | 10- 7-83 |
| 97 | Gary Stanford | | 1-10-83 | 3- 3-83 |
| | | x | 3-18-83 | 9-28-83 |
| 99 | Robert Kuhn | | 1-10-83 | 6-15-83 |
| | | x | 6-29-83 | 12- 9-83 |
| 102 | Clayton Hoffman | | 1-10-83 | 6-21-83 |
| | | x | 6-29-83 | Still working |
| 116 | Donald Blakeman | | 4- 4-83 | 6-15-83 |
| | | x | 6-29-83 | 11- 4-83 |
| 118 | Edward Palmer | | 4- 4-83 | 6-15-83 |
| | | x | 6-29-83 | 9-28-83 |
| 119 | Randy Lindhorst | | 4- 4-83 | 6-21-82 |
| | | x | 6-29-83 | 11- 4-83 |
| 122 | Daniel Allen | | 4-4-83 | 4- 5-83 |
| | | x | 4- 8-83 | 4-22-83 |
| | | x | 4-29-83 | 9-28-83 |
| 128 | Charles Fisher | | 4- 4-83 | 6-22-83 |
| | | x | 6-29-83 | 10-14-83 |

Exhibit C to Deposition of Lynn Breininger,
Pages 1, 2, 3, 4, 10, 11

ARTICLE OF AGREEMENT

Between

TOLEDO AREA SHEET METAL AND ROOFING
CONTRACTORS ASSOCIATION
TOLEDO HEATING AND AIR CONDITIONING
CONTRACTORS ASSOCIATION

And

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 6
TOLEDO, OHIO

THIS CONTRACT HAS BEEN AMENDED AND EXTENDED THROUGH JUNE 30, 1984 IN ACCORDANCE WITH THE ATTACHED MEMORANDUM OF AGREEMENT.

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AGREEMENT BETWEEN

TOLEDO AREA SHEET METAL AND ROOFING CONTRACTORS ASSOCIATION, TOLEDO HEATING AND AIR CONDITIONING CONTRACTORS ASSOCIATION,

and

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 6

AGREEMENT

(1) The following articles are the total accumulation of the sections of the Standard Form of Agreement and Addenda agreed to between Management and Labor on July 1, 1980.

(2) AGREEMENT, entered into this 1st day of July, 1980, by and between the Toledo Area Sheet Metal and Roofing Contractors Association and the Toledo Heating and Air Conditioning Contractors Association hereinafter referred to as the Employer, and Local Union No. 6 of the Sheet Metal Workers Inter-

national Association, hereinafter referred to as the Union for Toledo, Ohio, and the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio and Monroe and Lenawee Counties in Michigan.

Whenever in this agreement "man" or "him" or their related pronouns may appear, either as words or parts of words, they have been used for representative purposes and are meant to include both female and male sexes.

## COLLECTIVE BARGAINING UNIT

Section 1. The persons, firms, corporations, joint ventures, or other business entities bound by the terms of the Agreement are referred to in this Agreement as "Employer" or "Employers." The Employers and the Union by entering into this Agreement intend to and agree to establish a single multi-employer collective bargaining unit. Any Employer who becomes a party to this Agreement shall thereby become a member of the multi-employer collective bargaining unit established by this Agreement.

Section 2. Employers covered by this Agreement shall be free to designate their own representatives for the purpose of collective bargaining and contract administration; however, such designation shall not affect the Employer's membership in the collective bargaining unit established by this Agreement.

## ARTICLE I

## WORK JURISDICTION

(3) This Agreement covers the rates of pay, rules and working conditions of all employees of the employer engaged in but not limited to the (a) manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work and all other materials used in lieu thereof



and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment, all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air-handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection, including those taken from original architectural and engineering drawings or sketches; (e) all other work included in the jurisdictional claims of Sheet Metal Workers International Association; and (f) custom fabrication of non-building trade items are excluded from the term of this contract.

## ARTICLE II

## UNION SHOP

(4) Subject to other applicable provisions of this Agreement, the Employer agrees that when subcontracting for prefabrication of materials covered herein, such prefabrication shall be subcontracted to fabricators who pay their employees engaged in such fabrication not less than the prevailing wage for comparable sheet metal fabrication, as established under provisions of this Agreement.

(5) The Employer agrees that no Employee shall be discharged for refusing to work with other employees on construction who are not affiliated with a recognized Building Trades Craft Union.

(6) A Sheet Metal Shop or Sheet Metal business shall not be considered a union sheet metal shop or union sheet metal business unless the owners sign and remain parties to this Agreement, or an Agreement with the local union or these Associations in whose jurisdiction such shop or business is located. No sheet metal shop or sheet metal business shall be recognized as union or entitled to the privileges or use of the shop card or label unless it permanently employs one or more journeymen sheet metal workers in good

standing and with full membership in the Sheet Metal Workers International Association on all work covered by Article I of this Agreement, and permits not more than one (1) stockholder, owner, partner, or other person directly or indirectly financially interested in the management of such shop or business to work with the tools of the trade and then in the shop only.

## ARTICLE III

### SUBCONTRACTING

(7) The Contractor agrees that we will not subcontract job site work which is to be performed at a time when employees of the Contractor are working at such site under the terms of this Agreement to any employer which does not have at the time the work is to be performed, a collective bargaining relationship with a Building Trades union covering such work, whose members receive the prevailing wage rates.

(8) The Employer agrees that any portion of the work covered by this contract to be done at the job site shall be done either by his own forces in accordance with the terms of this agreement or by subcontractors who have signed agreements with Local Union No. 6

## ARTICLE IV

### EMPLOYER AGREEMENT

(9) The Employer agrees that none but journeymen and apprentice sheet metal workers shall be employed (except as provided in training plan) on any work described in Article I.

(10) If the Union furnishes employees to any employer/s within the jourisdiction of this agreement and allows said employer/s more favorable wages, terms or conditions, the Union agrees that the same more favorable wages, terms, or conditions shall automatically be extended to all employers covered by this agreement.



## ARTICLE V

### FURNISHING OF WORKERS; NON-DISCRIMINATION

(11) The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement. Employers agree to confirm, in writing, to Local No. 6 when requesting Employees. Tht Union agrees not to delay the referral of employees because of delays in mailing the request.

(12) The Employer may hire sufficient men to man his work if the Union cannot furnish same within a period of forty-eight (48) hours after their request.

(13) Whenever an Employer reduces his work forces, he shall do so on a priority basis to protect the local geographical area of skilled journeymen.

(14) The Employer agrees in the employment of men and the Union agrees in the referral of men and/or the selection of apprentices that there will be no discrimination because of race, color, religion, sex, handicap, or national origin in accordance with city, state or federal law.

(15) It is further agreed that the Joint Conference Board of the Toledo Building Congress shall act as a local hearing board for any charges of discrimination against any Employer, employer association, apprenticeship committee, union or individual on any complaint of discrimination, and that such board shall act as promptly as possible.

## ARTICLE VI

### UNION SECURITY

(16) The Employer agrees to require membership in the Union, as a condition of continued employment of

all employees performing any of the work specified in Article I of this Agreement, after eight (8) days following the beginning of such employment or the effective date of this Agreement, whichever is the later, provided the Employer has reasonable ground for believing that membership is available to such employees on the same terms and conditions generally applicable to other members and that membership is not denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fee uniformly required as a condition of acquiring or retaining membership.

(17) If, during the term of this Agreement the Labor-Management Relations Act of 1947 shall be amended by Congress in such manner as to reduce the time within which an employee may be required to acquire union membership, such reduced time limit shall become immediately effective instead of and without regard to the time limit specified in Paragraph 16 of this Article.

(18) The provisions of this Article shall be deemed to be of no force and effect in any state, to the extent to which the making or enforcement of such provision is contrary to law. In any state where the making and enforcement of such provision is lawful only after compliance with certain conditions precedent, this Article shall be deemed to take effect as to involved employees immediately upon compliance with such conditions.

## ARTICLE VII

## WORKING HOURS; OVERTIME; HOLIDAYS; SHIFT OR NIGHT WORK; ETC.

(19) The regular working day shall consist of eight (8) hours labor in the shop or on the job between seven (7) a.m. and four-thirty (4:30) p.m. and regular working week shall consist of five (5) consecutive eight (8) hour days labor in the shop or on the job, beginning



with Monday and ending with Friday of each week. All full time or part time labor performed during such hours shall be recognized as regular working hours and paid for at the regular hourly rate. Except as otherwise provided pursuant to Paragraph 26 of this Article, all work performed outside the regular working hours and performed during the regular work week, shall be at double time and regular hourly rate.

(20) The Employer, without penalty, may schedule an eight hour work day between the hours of 7 o'clock a.m. and 5 o'clock p.m., provided he gives notice of same to the Northwestern Ohio Building and Construction Trades Council before the close of business on the previous business day.

(21) Rules of the Building Trades Council of working hours will be followed on all construction sites.

(22) Employees shall be allowed coffee or other non-alcoholic beverage twice during working hours (morning and afternoon) at their immediate respective work station with a maximum total of ten minutes for each break.

When an Employee is requested to work in excess of nine (9) hours, there shall be an additional coffee break at the eight (8th) hour and every (4) hours thereafter.

When an Employee is requested to work in excess of ten (10) hours a day in which overtime has not been scheduled, the Employee shall receive a thirty (30) minute lunch period after the tenth (10th) hour, paid by the Employer at the appropriate rate. In the case of scheduled overtime, the Employee shall receive a thirty (30) minute lunch break after the tenth (10th) hour and every fourth (4th) hour thereafter, for which he will not be paid.

Scheduled overtime must be scheduled by the end of the previous day's regular shift.

(23) Employees shall be at the shop or project site at scheduled starting time each day and shall remain until quitting time.

(24) New Year's Day, Decoration Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day or days locally observed as such shall be recognized as holidays. All work performed on holidays, Saturday, and Sunday shall be paid at double the regular hourly rate, except as provided for in three shift operations.

(25) It is agreed that all work performed outside of regular working hours during the regular work week and on holidays shall be performed only upon notification by the Employer to the local union in advance of scheduling such work. Preference to overtime and holiday work shall be given to men on the job on a rotation basis so as to equalize such work as nearly as possible.

(26) SHIFT OR NIGHT WORK—When two-shift or night work operations are performed, base rate plus 15% shall be poid. (sic) Shift or night work of more than (8) hours per day shall be paid at overtime rate.

(a) If an Employee who has worked continuously from the start of his scheduled shift and is directed to report for work at the start of his regular shift the following day without six (6) hours elapsed in between shifts, he shall receive the applicable overtime rate. If the Employee requests to work on a different job site and location without a six (6) hour elapsed time between shifts and the Employer agrees, he shall receive the normal rate.

(b) No workman shall suffer a loss of working time as a result of shift or night work that would reduce his working time below 40 hours for the week.

(c) No work can be considered as shift or night work unless at least a minimum of three days

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change its Savings/Vacation Plan deduction or Dues deduction, the changes shall become effective upon the date requested by the Union, providing the Employer is given a 60 day notice.

TACW FUNDING

If the Toledo Area Construction Workers' Health and Welfare Fund falls below predetermined safe financial level of operation, then the contribution rate shall be increased by the amount determined to be needed by the Trustees, or benefits would be reduced to protect the safe financial level.

## ARTICLE XI

## CONTRACTORS ADMINISTRATIVE FUND

(68) Each employer shall pay $.10 for each hour paid to each employee of the Employer within the bargaining unit. Such payments by check shall be made payable to the Toledo Area Construction Workers Health and Welfare Fund Trustees as depository and shall be transmitted to the Contractors Administrative Fund, 1806 Madison Avenue, Toledo, Ohio 43624, no later than the 15th day of the month following the calendar month in which the work was performed. Reporting forms shall be furnished by the Trustees of the Contractors Administrative Fund to the Employers and the form shall provide that the ten cents ($.10) an hour be made by a separate check payable to the Toledo Area Construction Workers Health and Welfare Fund Trustees as depository. Delinquent contributions shall be subject to such Penalties or assessments as the Trustees of the Fund may prescribe from time to time.

In no event shall the foregoing provisions of this Section be subject to or suitable for grievance and arbitration under this Agreement.

The Trustees of said Fund shall comply with all present and future Federal laws governing the same.

The Union shall have no participation or control of any kind or degree whatever nor shall the Union be connected in any way with the Contractors Administrative Fund.

The Employer Association party to this Agreement agrees to defend, indemnify and hold harmless the Union from any and all claims made against it arising out of the establishment and existence of the Fund.

Effective July 1, 1981, the Contractors Administrative Fund may be increased $.01/hour at the option of the Northwestern Ohio Council of Construction Employers.

## ARTICLE XII

## TOOL REQUIREMENTS

(69) Journeyman shall furnish the following tools:

One six foot rule (folding)
Straight snips
Rivet sets (as required)
Combination square with level (12″)
Crescent or open end wrench
Pliers and tongs
Prick punch, cold chisel
Dolly bar
Two pair aviation snips (right & left)
Screw Drivers (as required)
Hack saw frame
Dividers (as required)
Hammers (tinners)
Scratch awl, center punch
Drift pin

Journeymen will not be permitted to furnish any power tools.



(70) All special tools and equipment such as drill motors, step ladders, levels, C. clamps, extension cords, 16″ x 24″ square, circumference rules, drawing tools, and board, mallets, whitney punches, machine punches, saw blades, saws, drills, files, solder irons, firepots, welding hood and other protective equipment as required for welding, pop rivet guns and socket sets shall be furnished by the Employer.

(71) SAFETY EQUIPMENT

The Employer shall furnish hardhats, new hardhat webbing and liners, eye protection, face shields, respirators and mask, helmets and hods, gloves aprons, and sleeves and other protective equipment as required for burning, welding, working with acid, etc.

(72) The Employer shall furnish protection for the Employee's hand tools and the Employer's own possessions on all jobs where needed by proper gang boxes and padlocks. The Employer will be responsible for loss from the gang box by fire or theft. Proof of loss will be required.

(73) Employees covered by this Agreement shall not be permitted or required as a condition of employment to furnish the use of an automobile or other conveyance to transport men, tools, equipment or materials from shop to job, from job to job, or from job to shop; facilities for such transportation to be provided by the Employer. This provision shall not restrict the use of an automobile or other conveyance to transport its owner and personal tools from home to shop or job at starting time or from job to home at quitting time.

## ARTICLE XIII

## GRIEVANCE AND ARBITRATION

(74) Grievance of the Employer or the Union arising out of interpretation or enforcement of this Agree-

ment, shall be settled between the Employer directly involved and the duly authorized representative of the Union, if possible. An Employer may have the local Association present to act as his representative.

(75) Grievances not settled as provided in Paragraph 74 of this Article may be appealed by either party to the Local Joint Adjustment Board in the area in which the work is performed and such Board shall meet promptly on a date mutually agreeable to the members of the Board, but in no case more than fourteen (14) calendar days following the request for its services, unless the time is extended by mutual agreement of the parties, to render a final and binding determination, except as provided in Paragraphs 77 and 80 of this Article. The Board shall consist of an equal number of representatives of the Union and of the local Employers' Association and both sides shall cast an equal number of votes at each meeting. The local Employers' Association, on its own initiative, may submit grievances for determination by the Board as provided in this Paragraph.

(76) Notice of appeal to the Local Joint Adjustment Board shall be given within thirty (30) days after termination of the procedures prescribed in Paragraph 74 of this Article, unless the time is extended by a mutual agreement of the parties.

(77) Grievances not disposed of under the procedure prescribed in Paragraph 75 of this Article, because of a deadlock, or failure of such Board to act, may be appealed jointly or by either party to a Panel consisting of one (1) representative appointed by the Chairman of the Labor Relations Committee of Sheet Metal and Air Conditioning Contractors' National Association, Inc. Appeals on behalf of employees shall be mailed to the General Secretary-Treasurer of the Sheet Metal Workers International Association and those on behalf of an employer mailed to the Secretary of the Labor Committee of the Sheet Metal and



Air Conditioning Contractors' National Association, Inc. Joint appeals shall be mailed to the Secretaries of both Associations. Notice of appeal to the Panel shall be given within thirty (30) days after termination of the procedures prescribed in Paragraph 75 of this Article. Such Panel shall meet promptly, but in no event more than fourteen (14) calendar days following receipt of such appeal, unless such time is extended by mutual agreement of the Panel members. Except in case of deadlock, the decision of the Panel shall be final and binding.

(78) Notwithstanding the provisions of Paragraph 77 a contractor who was not a party to the labor agreement of the area in which the work in dispute is performed may appeal the decision of the Local Joint Adjustment Board, including a unanimous decision, and request a Panel hearing as set forth in Paragraph 77 of this Article, providing such appeal is approved by both the Chairman of the Labor Relations Committee of Sheet Metal and Air Conditioning Contractors' National Association, Inc. and by the General President of Sheet Metal Workers International Association.

(79) Grievances not settled as provided in Paragraph 77 of this article may be appealed jointly or by either party to the National Joint Adjustment Board, as established by the Sheet Metal Workers' International Association and the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Submission shall be made and decisions rendered under such procedures as may be prescribed by such Board, from time to time, and mutually approved by the parties creating it. Copies of the procedures shall be available from, and submissions of grievances may be made to, either the General Secretary-Treasurer of Sheet Metal Workers' International Association or the Secretary of the Labor Committee of the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Submissions on appeal to the National Joint Ad-

justment Board shall be made within thirty (30) days after termination of the procedures prescribed in Paragraph 77 of this Article.

(80) A Local Joint Adjustment Board, Panel and the National Joint Adjustment Board are empowered to render such decisions and grant such relief to either party as they deem necessary and proper, including awards of damages or other compensation and, if it is believed warranted, to direct that the involved agreement and any other agreement or agreements between the employer and any othr local union affiliated with the Sheet Metal Workers' International Association be cancelled, provided that any decision of a Local Joint Adjustment Board directing cancellation of an agreement or agreements may be appealed by the affected employer or local union as a matter of right, directly to the National Joint Adjustment Board.

(81) In the event any party fails or refuses to comply with any decision of a Local Joint Adjustment Board or Panel without appeal, or any decision of the National Joint Adjustment Board, within thirty (30) days after notice thereof, a Local Joint Adjustment Board, Panel, or any party to the dispute may, in addition to any other legal remedies which may be available to the parties, request the National Joint Adjustment Board to cancel the involved agreement and any other agreements between the involved employer and other local unions affiliated with Sheet Metal Workers' International Association. Unless otherwise decided by unanimous vote, the National Joint Adjustment Board shall cancel such agreements if it finds the involved party to be in non-compliance with the decision in question. Requests for the Board's services shall be made in the same manner and in the same form as other appeals to the National Joint Adjustment Board and the procedure followed shall be the same except that any intermediate step or steps shall be omitted and the request made directly to the National Joint Adjustment Board.



(82) Failure to exercise the right of appeal at any step thereof within the time limit provided therefore shall void any right of appeal applicable to the facts and remedies of the grievance involved. There shall be no cessation of work by strike or lockout during the pendency of the procedures provided for in this Article. Except in case of deadlock, the decision of the National Joint Adjustment Board shall be final and binding.

(83) Nothing contained in this Article shall apply to any controversy or dispute arising out of any notice of reopening of this Agreement as provided in Article XXI thereof.

## ARTICLE XIV

(84) Agreements, national in scope, between Sheet Metal Workers' International Association and other International Unions, covering work jurisdiction and the assignment, allocation and division of work among employees represented for the purposes of collective bargaining by such labor organizations, shall be respected and applied by the Employer, provided such Agreements have been consummated with the knowledge of and without objection from Sheet Metal and Air Conditioning Contractors' National Association, Inc.

(85) Pre-Job Conference—A pre-job conference will be held upon request of the Union or a Contractor when there exists a threat of a dispute between affiliates of the Northwestern Ohio Building and Construction Trades Council to the Jurisdictional Committee as established between the AFL-CIO. Pending the submission and settlement of the dispute the affiliated of the Northwestern Ohio Building and Construction Trades Council will man the job without work stoppages or interference with the Contractors' work.

(86) Jurisdictional Disputes—All jurisdictional disputes between or among building and construction

unions and employers, parties to this Agreement, shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department (plan for National Joint Board for Settlement of Jurisdictional Disputes in the Building and Construction Industry) or any other plan or method of procedure that may be adopted in the future by the building and Construction Trades Department. Decisions rendered shall be final, binding and conclusive on the Employer and Union parties to this Agreement.

ARTICLE XV

APPRENTICESHIP

(87) All duly qualified apprentices shall be under the supervision and control of a Joint Apprentice Committee composed of six (6) members, three (3) of whom shall be selected by the Employer, and three (3) by the Union. Said Joint Apprentice Committee shall formulate and make operative such rules and regulations as they may deem necessary and which do not conflict with the specific terms of this Agreement, to govern eligibility, registration, education, transfer, wages, hours, working conditions of duly qualified apprentices and the operation of an adequate apprentice system to meet the needs and requirements of the trade. Said rules and regulations when formulated and adopted by the parties hereto shall be recognized as part of this Agreement.

(88) The Joint Apprentice Committee designated herein shall serve for the life of this Agreement, except that vacancies in said Joint Apprentice Committee caused by resignation or otherwise, may be filled by either party hereto, and it is hereby mutually agreed by both parties hereto, that they will individually and collectively cooperate to the extent that duly

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| Lynn L. Breininger | ) | Case No. 83-1126 |
| | ) | Honorable Nicholas J. |
| Plaintiff | ) | Walinski, Senior Judge |
| | ) | |
| v. | ) | DEFENDANT LOCAL |
| | ) | UNION'S BRIEF IN |
| Sheet Metal Workers | ) | SUPPORT OF MOTION |
| International Association | ) | FOR SUMMARY |
| Local Union No. 6 | ) | JUDGMENT AND/OR |
| | ) | IN THE ALTERNATIVE |
| Defendant | ) | TO STRIKE JURY |
| | ) | DEMAND |

I. INTRODUCTION

On or about December 13, 1983, the plaintiff Lynn L. Breininger instituted this lawsuit alleging a cause of action based on a breach of the duty of fair representation under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 151, § 158(b) and § 159 (hereinafter referred to as the "LMRA"). Subsequently, on or about March 16, 1984, the plaintiff amended his Complaint to allege a violation of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 19 U.S.C. § 411, § 412 and § 529 (hereinafter referred to as the "LMRDA"). The following brief discussion will clearly demonstrate that: (a) jurisdiction over plaintiff's Complaint is preempted by the exclusive jurisdiction of the National Labor Relations board (hereinafter referred to as the "NLRB"); (b) the duty of fair representation owed to all collective bargaining unit members by defendant Steet Metal Workers International Association Local Union No. 6 (hereinafter referred to as the "Union") has in no way been breached

by defendant Union in the instant case; and (e) defendant Union has in no way violated 29 U.S.C. §§ 411(5) and/or 529 with respect to plaintiff in making hiring hall referrals. Thus, no actionable claim exists for plaintiff under either 29 U.S.C. §§ 151, 158(b), and/or 159 or 29 U.S.C. §§ 411(5) and/or 529. Therefore, defendant Union is entitled to summary judgment on plaintiff's Complaint.

In addition, or in the alternative, defendant Union has moved this Court to strike plaintiff's demand for jury trial. As will be clearly demonstrated herein, there exists no right to jury trial on plaintiff's claim(s) under either the LMRA and/or the LMRDA. Therefore, defendant Union's Motion to Strike must be granted.

## II. STATEMENT OF FACTS

The plaintiff is and has been at all times material hereto a member of defendant Union [*See*, defendant Union's June 13, 1984 deposition of plaintiff Lynn L. Breininger, hereinafter referred to as "Union deposition", at 19]. The defendant Union is signatory to a collective bargaining agreement with various contractor employers within the defendant Union's jurisdiction of the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio, and the counties of Monroe and Lenawee in Michigan [*See*, Union deposition at 27 and Union Exhibit C at 3, ¶ 2]. The plaintiff is familiar with the collective bargaining agreement [*See*, Union deposition at 22-25]. The collective bargaining agreement provides that the defendant Union refer sheet metal workers to employer contractors working within defendant Union's jurisdiction as they are requested [*See*, Union deposition at 22-25 and Union Extibit C].



The defendant Union does not maintain an exclusive hiring hall system [*See*, affidavit of David Williams]. Rather, a member of defendant Union has several options through which to obtain employment [*See*, Union deposition at 27-28]. First, a member desiring employment may have his/her name placed on the out-of-work list maintained by defendant Union at the Union hall [*See*, Union deposition at 28]. Second, a member may have his/her name placed on a separate list authorizing the defendant Union to refer him or her for work under the Specialty Agreement, a separate collective bargaining agreement negotiated to cover work on siding, decking and metal buildings [*See*, Union deposition at 44-45]. Work performed pursuant to the Specialty Agreement is paid at a wage rate lower than that of work performed under the general agreement [*See*, Union deposition at 45]. The defendant Union cannot refer a member for work under the Specialty Agreement without the member being signed up on the list for such work and working under the Specialty Agreement is strictly voluuntary [*See*, Union deposition at 44-47].

The out-of-work list maintained by the defendant Union is signed by members who want to be referred to jobs by the defendant Union [*See*, Union deposition at 29]. When an employer contacts the defendant Union for workers, and does not request workers by name, the Union begins at the top of the list and attempts to telephone each person in the order they appear on the list and continues doing so until the requisite number of people accept the job [*See*, Union deposition at 30-32, and affidavit of David Williams].

Members of defendant Union who wish to also be referred to jobs pursuant to the Specialty Agreement sign a separate list kept for this specific purpose [*See*, Union deposition at 46]. When the defendant Union receives a request for workers from an employer under to the Specialty Agreement, the defendant Union begins at the top of this list and attempts to telephone each person in the order they appear on the list and continues doing so until the requisite number of people accept the job [*See*, Union deposition at 46 and affidavit of David Williams].

Further, it is the practice of the defendant Union to also allow individuals to solicit employment on their own volition in addition to being signed up on the referral list(s) [*See*, Union deposition at 50 and affidavit of David Williams]. It is not uncommon for members of defendant Union to do so [*See*, Union deposition at 50]. The employee does not use the referral list to solicit employment on his or her own[1] [*See*, Union deposition at 28].

Finally, an employer can request for referral a specific employee or employees by name [*See*, Union deposition at 28]. In the event this occurs, the defendant Union will attempt to contact and refer the specific individual or individuals requested to the job [*See*, Union deposition at 30 and affidavit of David Williams]. If the defendant Union is unable to reach a requested individual or if that

1. In any event, a non-local contractor (a contractor that does not maintain its principal place of business within the territorial jurisdiction of the defendant Union) can only hire two (2) individuals without reference to the defendant Union's out-of-work list. The remainder of the non-local contractors manpower needs must be filled off the defendant Union's out-of-work list [*See*, affidavit of David Williams].



individual refuses the referral, the defendant Union will refer individuals in order from the out-of-work list to satisfy the employer's need for workers[2] [*See*, Union deposition at 66 and affidavit of David Williams].

In each instance of referral the person contacted by the defendant Union has the right and responsibility to either accept or refuse a job [*See*, Union deposition at 31]. Refusal to accept a job does not affect a person's place on the particular referral list in question [*See*, Union deposition at 31]. Rather, the individual maintains his or her current position on the list and will be contacted by the defendant Union by order of the list for future referral [*See*, Union deposition at 31]. Acceptance of a job will not remove a person's name from the referral list until that person has worked ten (10) consecutive working days [*See*, Union deposition at 33]. This is so due to the nature of the industry in that jobs are frequently short in duration and/or for temporary emergency work [*See*, Union deposition at 32-34].

To be referred to a job, an employee does not have to be present at the Union hall when the request by the employer is made [*See*, Union deposition at 34]. The employee will place his or her telephone number on the referral list with their name and the defendant Union will call the employee at the given telephone number when

2. In any event, a non-local contractor (a contractor that does not maintain its principal place of business within the territorial jurisdiction of the defendant Union) can only hire two (2) individuals without reference to the defendant Union's out-of-work list. The remainder of the non-local contractors manpower needs must be filled off the defendant Union's out-of-work list [*See*, affidavit of David Williams].

the employee is next on the list for referral[3] [*See*, Union deposition at 34 and affidavit of David Williams]. Further, the employee need not come to the Union hall to put his or her name on the referral list but may do this also by merely telephoning the Union hall and requesting to be put on the referral list [*See*, Union deposition at 35].

The plaintiff, Lynn L. Breininger, is personally familiar with and understands all aspects of the defendant Union's non-exclusive referral system [*See*, Union deposition at 26]. The plaintiff is also personally familiar with and understands the self-solicitation method of obtaining employment [*See*, Union deposition at 27]. The plaintiff has signed the regular out-of-work list and has been referred by defendant Union to employment from the list [*see*, Union deposition at 52-53]. However, the plaintiff has never signed the Specialty Agreement out-of-work list and is thus ineligible for referral to jobs pursuant to the Specialty Agreement [*See*, Union deposition at 46 and affidavit of David Williams]. Further, the plaintiff has also solicited and received employment on his own accord [*See*, Union deposition at 49-50].

The defendant Union has repeatedly called the plaintiff for job referrals when the plaintiff's name has come up on the list pursuant to referral procedure [*See*, Union deposition at 53, 97-98, 112, 128, 137]. Further, the defendant Union has never attempted to interfere with plain-

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3. There are occasions where defendant Union is unable to reach an individual on the out-of-work list by telephone. On these occasions, the defendant Union will contact the next person appearing on the defendant Union's out-of-work list [*See*, affidavit of David Williams].



tiff's self-solicitation of work [*See*, Union deposition at 50, 133-134 and affidavit of David Williams]. In addition, as stated by the plaintiff himself, the defendant Union has always put the plaintiff's name on the regular referral list as requested [*See*, Union deposition at 130, 135, and 137], and the defendant Union has always informed the plaintiff of his placement on the regular referral list when asked [*See*, Union deposition at 101-103]. The plaintiff has also been supplied with a copy of the collective bargaining agreement by the defendant Union [*See*, Union deposition at 24] and a copy of the Constitution and Ritual of the Sheet Metal Workers International Association (hereinafter referred to as the "International Constitution") upon request by plaintiff [*See* Union deposition at 26].

On or about March 16, 1984, the plaintiff filed a First Amended Complaint in this action [*See*, Union deposition at 5 and Union Exhibit A]. Plaintiff's Complaint alleges jurisdiction of this Court and violations of the LMRA, 29 U.S.C. § 151, § 158(b) and § 159, and of the LMRDA, 29 U.S.C. § 411, and § 529. The following brief discussion will clearly demonstrate that: (a) jurisdiction of plaintiff's Complaint is preempted by the exclusive jurisdiction of the NLRB; (b) that defendant Union has not violated any right of plaintiff pursuant to the LMRDA; and/or, in the alternative, (d) that no right to jury trial exists for any of plaintiff's claims. Therefore, defendant Union is entitled to summary judgment on plaintiff's Complaint, and/or in the alternative, plaintiff's demand for jury trial must be stricken.

## III. THE DEFENDANT UNION IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS OF PLAINTIFF'S CLAIM(S) AS A MATTER OF LAW.

Rule 56(c) of the Federal Rules of Civil Procedure provides in relevant part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In ruling "on a motion for summary judgment, the Court must construe the evidence in its most favorable light for the party opposing the motion and against the movant." *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425, 427 (6th Cir. 1962). However, Rule 56 of the Federal Rules of Civil Procedure goes on to provide:

> When a motion for summary judgment is made and supported as provided in this rule, and adverse party may not rest upon the mere allegations or denials of his pleading but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 56(e), Fed. R. Civ. P. If the plaintiff places such facts in evidence and reasonable minds could differ as to a material fact in issue then a genuine factual dispute exists and the motion for summary judgment must be denied. The following brief discussion will clearly demonstrate that there are no genuine disputes as to any issues of material fact and that as a matter of law the allegations



of plaintiff's Complaint are preempted and that defendant Union did not violate § 101(a)(5) and/or § 609 of the LMRDA, 19 U.S.C. § 411(a)(5) or § 529.

### A. JURISDICTION OF PLAINTIFF'S COMPLAINT IS PREEMPTED BY THE EXCLUSIVE JURISDICTION OF THE NLRB.

The NLRB has exclusive jurisdiction over matters which are arguably protected by § 7 of the LMRA, 29 U.S.C. § 157, or are arguably unfair labor practices prohibited by § 8 of the LMRA, 19 U.S.C. § 158. *Farmer v. Carpenters*, 430 U.S. 290, (1977); *Machintsts v. Wisconsin Empl. Rel. Comm'n.*, 427 U.S. 132, (1976); *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S. Ct. 1909, 29 L.Ed. 2d 473 (1971); *Local 100, United Association of Journeymen and Apprentices v. Borden*, 373 U.S. 690, 83 S. Ct. 1423, 10 L.Ed. 2d 638 (1963), *reh. den.* 375 U.S. 872, 84 S. Ct. 28, 11 L.Ed. 2d 101 (1964). As was recently affirmed by this Court, discrimination against members constitutes an unfair labor practice under § 8(b)(1)(A) and § 8(b)(2) of the LMRA, 29 U.S.C. § 158(b)(1)(A), and (b)(2), and therefore, the Federal District Court's jurisdiction is preempted. *Local Lodge 355 v. Boilermakers*, — F.Supp. —, 121 LRRM 2848, 2850 (D. Ohio, 1986). *See also, Farmer, supra*, at 303, n11; *Operating Engineers Local 18*, 205 NLRB 901, 84 LRRM 1349 (1973), *enforced*, 500 F.2d 48 2932 (6th Cir. 1974).

As was stated by this Court in *Local Lodge 355, supra:*

> In the case subjudice, the controversy presented to this Court is identical to that which was presented to the NLRB. This Court is being asked to decide if de-

> fendant Local 85 discriminated in hiring hall referrals. This issue is central to both a finding of a breach of contract by defendant Local 85 and to the alleged unfair labor practice. The underlying controversy remains unchanged in both causes of action. Consequently, if this Court were to exercise jurisdiction over this cause of action, it would necessarily involve a risk of interfering with the NLRB's jurisdiction over unfair labor practices. Thus, this Court finds that its jurisdiction is preempted by the NLRB.

*Id.* at 121 LRRM 2850. Thus, jurisdiction over a cause(s) of action where the underlying controversy is allegation of discrimination in hiring hall referrals is preempted by the exclusive jurisdiction of the NLRB. *Local Lodge 355, supra.*

In the instant action, the controversy underlying both causes of action set forth in plaintiff's First Amended Complaint is the allegation of discrimination in hiring hall referrals [*See,* Union deposition at 5 and plaintiff's First Amended Complaint 3, ¶ 6 and 6, ¶ 17]. As this Court has ruled in *Local Lodge 355, supra,* the NLRB has exclusive jurisdiction over such claims. Thus, this Court is without jurisdiction and is precluded from hearing plaintiff's claims. Therefore, the defendant Union is entitled to summary judgment as a matter of law.

B. THE UNDISPUTED MATERIAL FACTS DEMONSTRATE NO VIOLATION OF THE LMRDA BY THE DEFENDANT UNION.

The plaintiff has alleged that the defendant Union has "otherwise disciplined" plaintiff in violation of § 101 (a)(5) and (b) and § 609 of the LMRDA, 29 U.S.C. § 411 (a)(5), (b) and § 529 in "failing to refer him for employ-



ment" and by discriminatory treatment in job referrals [*See,* plaintiff's First Amended Complaint at 6, ¶ 16, and ¶ 17]. Assuming for the purposes of argument only that jurisdiction is not preempted by the exclusive jurisdiction of the NLRB, it is clear that the defendant Union has not violated any right of plaintiff pursuant to § 101(a)(5) or § 609 of the LMRDA, 29 U.S.C. § 411(a)(5) and § 529.

The United States Supreme Court has held that the term "otherwise disciplined" as used by § 101(a)(5), (b) and § 609 of the LMRDA, 29 U.S.C. § 411(a)(5), (b) and § 529 refers only to the membership rights of union members and does not include employment rights or discrimination in employment. *Finnegan v. Leu,* 456 U.S. 431 (1982). As held by the Supreme Court, this is the case because the specifically enumerated sanctions in 29 U.S.C. § 411, and § 529 i.e., "fine, suspension, and expulsion" are all actions which can only be taken against members as members. *Finnegan v. Leu, supra.*

Consistent with the U.S. Supreme Court decision in *Finnegan v. Leu, supra,* this Court has long held that the LMRDA refers to and applies only to membership rights of Union members. *Hill v. Aro Corporation,* 275 F.Supp. 482 (N.D. Ohio, 1967). Other courts have followed this principle. *See, Turner v. Local Lodge #455,* 755 F.2d 866 (11th Cir., 1985); *Hackenburg v. Boilermakers Local 101,* 694 F.2d 1237 (10th Cir., 1982). As was stated by this Court in *Aro Corporation, supra,* § 101 of the LMRDA sets forth certain rights of union members "including freedom of speech and assembly and equal rights with other members" and that § 609 of the LMRDA makes it

unlawful for a union "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled to "under the LMRDA. *Id.* at 488-489. This being the case, this Court in *Aro Corporation* found that the complaint, which alleged no violation of membership rights, did not state a claim upon which relief can be granted under the LMRDA.

Applying the above to the instant case, it is clear that plaintiff's allegations of discrimination in hiring hall referrals does not state a cause of action under 29 U.S.C. § 411(a)(5)(b) or 29 U.S.C. § 529. The LMRDA refers to membership rights only and not to employment rights. *Finnegan v. Leu, supra, Aro Corporation, supra.* The plaintiff's claim(s) brought pursuant to the LMRDA refer not to plaintiff's membership rights as a member but only to employment rights [*See,* plaintiff's First Amended Complaint at 6, ¶¶ 16-17]. An examination of plaintiff's own deposition demonstrates that the plaintiff has not been deprived of any membership right(s) [*See,* Union deposition at 20, 24, 26, and 27]. Specifically, plaintiff states that he has attended Union meetings [*See,* Union deposition at 20, 27]; been given upon request and has never been refused a copy of both the collective bargaining agreement and the Sheet Metal Workers International Association Constitution and Ritual [*See,* Union deposition at 24, 26]; and has voted in Union elections [*See,* Union deposition at 161, 183]. Thus, plaintiff has not been denied any membership right(s) by the defendant Union. Therefore, the defendant Union is entitled to summary judgment on plaintiff's claim as a matter of law.



## IV. A JURY TRIAL IS NOT AVAILABLE TO A PLAINTIFF IN EITHER A § 301 LMRA SUIT OR A § 101 OR § 609 LMRDA SUIT.

### A. THE PLAINTIFF IS NOT ENTITLED TO A JURY TRIAL IN A SUIT UNDER § 301 OF THE LMRA.

Plaintiff's First Amended Complaint contains a demand for jury trial. Because federal labor law developed under § 301 shows that a jury trial is not available for plaintiff's claims against either defendant, the defendant Union has moved to strike the jury demand. In 1947, through § 301, Congress established court jurisdiction of "[s]uits for violation of contracts between am employer and a labor organization." In the landmark case of *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), the Supreme Court ruled that § 301 required federal courts "to fashion a body of federal law for the enforcement of . . . collective bargaining agreements . . ." In the instant case plaintiff relies on the jurisdictional privileges of § 301. In so doing, however, plaintiff is also bound by the body of substantive federal labor law which has been developed under it. It is this specialized body of federal law, not general principles of common law, which governs all aspects of this case. *Del Costello v. International Brotherhood of Teamsters,* 462 U.S. 151 (1983).

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| Lynn L. Breininger | ) | |
| | ) | |
| Plaintiff | ) | Case No. C 83-1126 |
| | ) | |
| vs. | ) | Hon. Nicholas J. Walinski, |
| | ) | Sr. Judge |
| Sheet Metal Workers | ) | |
| International Association | ) | AFFIDAVIT OF |
| Local Union No. 6 | ) | DAVID WILLIAMS |
| | ) | |
| Defendant | ) | |

STATE OF OHIO )
) SS:
COUNTY OF LUCAS )

I, David Williams, being first duly sworn according to law do state as follows:

1. That I have personal knowledge of the facts contained in this Affidavit.

2. That I am the Business Manager/Financial Secretary-Treasurer for the Sheet Metal Workers International Association Local Union No. 6 (hereinafter referred to as the "Union"), and that I was the Business Manager for the Union at all times mentioned in this Affidavit.

3. That as the Business Manager for the Union, I am familiar with the collective bargaining agreement between the Toledo Area Sheet Metal and Roofing Contractors Association, Toledo Heating and Air Conditioning Contractors Association (hereinafter referred to as the "collective bargaining agreement") and the Union and the



Constitution and Ritual of the International Union and the job referral procedure contained in these documents.

4. That pursuant to the collective bargaining agreement, the Union operates a non-exclusive referral service. This referral service is non-exclusive since a member of the Union seeking employment as a Sheet Metal Worker can obtain employment through any of the following ways:

a. the person can be requested by name by an employer from the Union's non-exclusive referral system,

b. the person can be referred off of the Union's referral (out-of-work) list, or

c. the person can solicit his/her own employment.

5. That the Union maintains a referral (out-of-work) list under the collective bargaining agreement and a separate referral (out-of-work) list under the Siding and Decking Specialty Agreement.

6. That in any event, a non-local contractor (a contractor that does not have its principle place of business within the territorial jurisdiction of the Union) is prohibited from securing more than two (2) individuals for employment as a Sheet Metal Worker without resort to the Union's referral (out-of-work) list. The remaining manpower needs of a non-local contractor must be filled off the Union's referral (out-of-work) list.

7. That the Union's non-exclusive referral service works as follows:

a. an individual laid off from work with an employer has his/her name placed on the Union's re-

ferral (out-of-work) list by either reporting to the Union's office or calling the Union's office,

b. the individual having his/her name placed on the referral (out-of-work) list has his/her name placed at the bottom of the out-of-work list;

c. the individual is not required to be present in the Union's office during referral hours, but instead, is required to leave a telephone number at the time the member has his/her name placed on the Union's referral (out-of-work) list,

d. an employer calls the Union's office and requests a certain number of Sheet Metal Workers (as opposed to requesting employees by name),

e. the Union takes the employer's request, goes to the Union's out-of-work list, and proceeds to telephone individuals on the referral list by beginning at the top of the list and calling individuals at the telephone numbers left by the individuals in the order they are on the referral (out-of-work) list. In the event the individual is reached, the work is offered to the individual who may accept or reject the work. In the event the individual is not reached, the Union telephones the next individual on the referral (out-of-work) list. This procedure is followed until the work is accepted by the number of individuals requested by the contractor,

f. the individual accepting the work is informed when and where to report to work,



g. the individual accepting the work reports to the employer requesting Sheet Metal Workers at the date and time designated by the employer, and,

h. the individual having had his/her name removed from the referral (out-of-work) list after the person has been employed by the employer for more than ten (10) consecutive work days.

8. That the employer retains the right to hire or not to hire employees dispatched through the Union's non-exclusive referral system.

9. That pursuant to the Union's non-exclusive referral system, an employer laying off a Sheet Metal Worker for lack of work on a project can recall that Sheet Metal Worker to work on the project so long as the Union's office is notified concerning the recall.

10. That in the event an employee is requested by name by either a local contractor (a contractor that maintains its principle place of business in the territorial jurisdiction of the Union) and/or a non-local contractor that has hired less than two (2) individuals without resort to the Union's referral (out-of-work) list, the Union will attempt to contact and refer the specific individual or individuals requested by the employer. If the Union is unable to reach the requested individual(s) or if the requested individual(s) refuse the referral, the Union will refer individuals off of the referral (out-of-work) list to satisfy the employer's need for workers.

11. That on a number of occasions, Plaintiff Lynn L. Breininger has had his name placed on the Union's re-

ferral (out-of-work) list for work under the collective bargaining agreement.

12. That Plaintiff Lynn L. Breininger has never had his name placed on the referral (out-of-work) list for work under the Siding and Decking Specialty Agreement.

13. That the Union has followed referral procedure with respect to all individuals signed on the referral list(s), including the Plaintiff Lynn L. Breininger, and has telephoned the Plaintiff Lynn L. Breininger when his name came up on the regular referral list and offered the referral to him if he was at home to receive the telephone call(s).

FURTHER AFFIANT SAYETH NAUGHT.

/s/ David J. Williams
David Williams

Sworn to and subscribed in my presence this 10th day of September, 1986.

/s/ Walter J. Ceiley
Notary Public

Walter J. Ceiley
Notary Public, State of Ohio
My Commission Expires Aug. 16, 1989

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

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| | CASE NO. C83-1126 |
| | Judge Nicholas J. Walinski |
| LYNN L. BREININGER<br><br>Plaintiff | PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND/OR IN THE ALTERNATIVE TO STRIKE JURY DEMAND |
| vs. | |
| SHEET METAL WORKERS INTERNATIONAL ASSOCIATION Local Union No. 6<br><br>Defendant | Francis J. Landry (4935)<br>WASSERMAN, BRYAN, LANDRY & HONOLD<br>300 Inns of Court Bldg.<br>405 N. Huron Street<br>Toledo, Ohio 43604<br>(419) 243-1239<br>Attorney for Plaintiff |

## I. INTRODUCTION

On December 13, 1983, plaintiff Lynn L. Breininger commenced the within action under the Labor Management Relations Act alleging that defendant breached its duty of fair representation in failing to refer him for employment. Subsequently, on or about March 16, 1984, plaintiff amended his judgment. *Moore's Federal Practice,* paragraph 56.15[6], 56.15[1], 56.27. However, in certain situations, the trial court may exercise a sound discretion in *denying* summary judgment in certain cases, such as when the court is not reasonably certain that there is not triable

issue of fact, or where a more complete factual record need be developed. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998, 96 S. Ct. 2215, 48 L.Ed. 2d 823 (1976); *Moore's Federal Practice*, Paragraphs 56.15[6] and 56.24.

Given the above discussion of nature of a Motion for Summary Judgment and the burdens placed on the moving party, plaintiff addresses the two contentions advanced by defendant in support of the Motion for Summary Judgment.

A. THIS COURT HAS JURISDICTION OVER PLAINTIFF'S COMPLAINT. DEFENDANT'S PRE-EMPTION ANALYSIS IS MISGUIDED AND BASED ON AN INAPPOSITE FACTUAL SITUATION.

In its Brief in Support of its Motion for Summary Judgment And/Or In The Alternative To Strike Jury Demand, defendant has contended that the NLRB has exclusive jurisdiction over matters which are arguably protected by Section 7 of the LMRA, 29 U.S.C. Section 157, or are arguably unfair labor practices prohibited by Section 8 of the LMRA, 29 U.S.C. Section 158. Therefore, the defendant reasons, since both causes of action in plaintiff's First Amended Complaint involve alleged discrimination in hiring hall referrals, the claims are pre-empted and this Court lacks jurisdiction.

Defendant has cited four (4) United States Supreme Court Decisions and one previous decision of this Court where one union sued another. All of the cases are inapposite as will be set forth below.

In plaintiff's first count of his First Amended Complaint, plaintiff brought a claim against defendant for an



alleged breach of said defendant's duty of fair representation. Curiously, in the one United States Supreme Court Decision omitted by defendant, *Vaca v. Sipes*, 386 U.S. 171 (1967), the Supreme Court held that since a union's duty, as exclusive agent, fairly to represent all members of a designated unit is based on federal statutes, federal law governs the employee's cause of action for breach of that duty. *Vaca v. Sipes, supra*, 386 U.S. at 176, 177. Additionally, in the same decision, the Supreme Court held that although the NLRB had then recently held that a union's breach of its statutory duty of fair representation is an unfair labor practice under Section 8(b) of the National Labor Relations Act, it does not follow that the broad pre-emption doctrine defined in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, holding that the NLRB has exclusive jurisdiction over activity arguably subject to Section 8 of the Act, is applicable thereto. *Vaca v. Sipes, supra*, 386 U.S. at 177-178. The Supreme Court in *Vaca*, explained its reasoning with a threefold analysis: (1) the pre-emption doctrine has not been rigidly applied where it could not be fairly inferred that Congress intended exclusive jurisdiction to lie with the NLRB; (2) the pre-emption rule has not been applied where the activity regulated was merely a peripheral concern of the LMRA; and (3) the doctrine of fair representation, which protects individuals against arbitrary union conduct, might be jeopardized by the NLRB's failure to act in certain cases, if the pre-emption doctrine were applied to oust the courts of their traditional jurisdiction to curb arbitrary union conduct. *Vaca v. Sipes, supra* 386 U.S. at 179-183.

The four Supreme Court cases cited by defendant all deal with the issue of federal pre-emption *over State Court*

*Claims.* In none of the cases did the plaintiff bring a claim alleging breach of a duty of fair representation. Because this issue is crucial to the Court's proper disposition of this motion, plaintiff will discuss each case in turn. In *Farmer v. United Brotherhood of Carpenters and Joiners of America, Local 25,* 430 U.S. 290 (1977), the Supreme Court dealt with the issue of whether certain State court claims were pre-empted by federal labor law. The Supreme Court in that very case noted that it refused to apply the pre-emption doctrine in certain circumstances, including those presented in the instant case. In *Farmers, supra,* the Supreme Court explained the nature of the pre-emption doctrine and its exceptions as follows at 430 U.S. at 286, 297:

> But the same considerations that underlie the Garmon rule have led the court to recognize exceptions in appropriate classes of cases. We have refused to apply the pre-emption doctrine to activity that otherwise would fall within the scope of Garmon if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Id., at 243-244. See, e.g., *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966) (malicious libel); *Automobile Workers v. Russell,* 356 U.S. 634 (1958) (mass picketing and threats of violence); *Machinists v. Gonzales,* 356 U.S. 617 (1958) (wrongful expulsion from union membership). We also have refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not deserve the interests promoted by the federal labor statutes." *Motor Coach Employees v. Lockridge,* at



297-298. *See Vaca v. Sipes, supra (duty of fair representation cases).* (emphasis added; footnotes omitted).

In footnote 8 of that opinion, the Court explained at 430 U.S. at 297, footnote 8:

> In addition to the judicially developed exceptions referred to in the text, *Congress itself has created exceptions to the Board's exclusive jurisdiction in other classes of cases.* Section 303 of the Labor Management Relations Act, 1947, 61 Stat. 158, as amended, 29 U.S.C. Section 187, authorizes anyone injured in his business or property by activity violative of Section 8(b)(4) of the NLRA, 61 Stat. 140, as amended, 29 U.S.C. Section 158(b)(4), to recover damages in federal district court even though the underlying unfair labor practices are remediable by the Board. See *Teamsters v. Morton,* 377 U.S. 252 (1964). Section 301 of the LMRA, 29 U.S.C. Section 185, authorizes suits for breach of a collective-bargaining agreement even if the breach is an unfair labor practice within the Board's jurisdiction. See *Smith v. Evening News Assn.,* 371 U.S. 195 (1962). Section 14(c)(2) of the NLRA, as added by Title VII, Section 701(a) of *the Labor-Management Reporting and Disclosure Action of 1959,* 73 Stat. 541, 29 U.S.C. Section 164(c)(2), permits state agencies and state courts to assert jurisdiction over "labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

Accordingly, the facts in *Farmer, supra,* are inapposite. The language of its opinion supports plaintiff's contention that his claims are not pre-empted.

The Second Supreme Court opinion cited by defendants, *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132 (1976), dealt again with federal pre-emption on the basis of federal labor policy over the authority of a state labor relations board to enjoin a union. In that case, the Supreme Court held that

the union's concerted refusal to work overtime was peaceful conduct constituting activity that must be free of state regulation if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated. The Supreme Court noted that Congress intended that self-help economic activities, whether of employer or employee, were not to be regulable by the states any more than by the NLRB. Accordingly, the decision is inapposite with the case at bar.

In the third Supreme Court opinion cited by defendant in support of its pre-emption argument, *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274 (1971), the Court again dealt with the issue of NLRA pre-emption of State Court jurisdiction. The Court specifically noted the *Vaca v. Sipes* exception to pre-emption as follows at 403 U.S. at 297-298:

> The pre-emption doctrine we apply today is, like any other purposefully administered legal principle, not without exception. Those same considerations that underlie *Garmon* have led this Court to permit the exercise of judicial power over conduct arguably protected or prohibited by the Act where Congress has affirmatively indicated that such power should exist, *Smith v. Evening News Assn.,* 371 U.S. 195 (1962), *Teamsters Union v. Morton,* 377 U.S. 252 (1964), where this Court cannot, in spite of the force of the policies *Garmon* seeks to promote, conscientiously presume that Congress meant to intrude so deeply into areas traditionally left to local law, e.g., *Linn v. Plant Guard Workers,* 383 U.S. 53 (1966); *Automobile Workers v. Russell,* 356 U.S. 634 (1958), *and where the particular rule of law sought to be invoked before another tribunal is so structured and administered that,*



> *in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes, Vaca v. Sipes,* 386 U.S. 171 (1967). (emphasis added).

The Supreme Court is *Lockridge, supra,* went on to explain at 403 U.S. at 299:

> Indeed, in *Vaca v. Sipes,* 386 U.S. 171 (1967), we held that an action seeking damages for injury inflected by a breach of union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective bargaining agreement.

Note that breach of the duty of fair representation was not asserted in *Lockridge.* 403 U.S. at 299-300. The Court, moreover, explained its reasoning at 403 U.S. at 301:

> Similarly, this Court's refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy. The duty of fair representation was judicially evolved, without the participation of the NLRB, to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment of the hands of the majority of his coworkers. Where such union conduct is proved it is clear, beyond doubt, that the conduct could not otherwise be regulated by the substantive federal law . . .

The defendant has also cited this Court's recent opinion in *Local Lodge 355 v. Boilermakers,* — F. Supp. —, 121 LRRM 2848, 2850 (N.D. Ohio, 1986), in support of its contention that discrimination against members con-

stitutes an unfair labor practice under Section 8(b)(1)(A) and Section 8(b)(2) of the LMRA, 29 U.S.C. Section 158(b)(1)(A), and (b)(2), and therefore, the Federal District Court's jurisdiction is pre-empted. That case is distinguishable for two reasons. The first point of departure is the *Local Lodge 355, supra* involved a suit by one local union against another local union. Unlike the present case, it did not constitute a claim by an aggrieved member that a union breached its duty of fair representation. Thus *Local Lodge 355* did not fall within the *Vaca v. Sipes, supra,* exception as discussed above. Secondly, in *Local Lodge 355,* the plaintiff had filed two sets of charges unsuccessfully with the NLRB. In the within case, Mr. Breininger testified in his deposition that he contacted the NLRB and was advised over the telephone that it was a contract dispute and that the NLRB did not handle it. See Breininger deposition at pp. 84-85. Note that the Supreme Court in *Vaca v. Sipes* explained that the doctrine of fair representation, which protects individuals from arbitrary union conduct, might be jeopardized by the NLRB's failure to act in certain cases, if the pre-emption doctrine were applied to oust the courts of their traditional jurisdiction to curb arbitrary union conduct. *Vaca v. Sipes, supra,* 386 U.S. at 179-183.

It is respectfully submitted, then, that this Court has jurisdiction over plaintiff's claim for breach of duty of fair representation.

With respect to plaintiff's second count of his First Amended Complaint, defendant has sweepingly alleged that pre-emption is applicable again for the reason that the NLRB has jurisdiction of an action where the underlying controversy is allegation of discrimination in hiring hall referrals. Defendant has cited no authority in support of its assertion that plaintiff's LMRDA claim is pre-empted. In response, plaintiff contends that in the LMRDA enacted in 1959, Congress provided for a direct civil action in federal district court by a union member against his local union. It is important to note that this federal cause of action was created prior to the NLRB's decision, in 1962, to treat discriminatory referrals as an unfair labor practice under 8(b)(1)(A). Accordingly, the same reasoning employed by the Supreme Court in *Vaca v. Sipes, supra,* is applicable by analogy.



More importantly, courts have held that union members' suits asserting violations of rights guaranteed under the LMRDA are not subject to pre-emption by the NLRB as the rights granted under the LMRDA are cumulative to those under the NLRA. See *Miller v. Holden,* 535 F. 2d 912 (5th Cir. 1976); *Cooke v. Orange Belt District Council of Painters No. 48,* 529 F. 2d 815 (9th Cir. 1976); *U.S. v. Local 560,* 550 F. Supp. 511 (D.N.J. 1982); *Keenan v. Metropolitan District Council of Philadelphia,* 266 F. Supp. 497 (D.Pa. 1966); *Schmid v. United Brotherhood of Carpenters and Joiners of America,* 773 F. 2d 993 (8th Cir. 1985). In *Vanderventer v. Local Union No. 513 of Int'l Union of Operating Engineers,* 579 F. 2d 1373 (8 Cir.), *cert. denied,* 439 U.S. 984, 99 S.Ct. 576, 58 L.Ed. 2d 656 (1978), the court held that a union member's complaint charging a union with discrimination in job referrals was not pre-empted by the NLRB.

For the reasons set forth above, this court should overrule defendant's motion for summary judgment as based on its pre-emption argument.

B. PLAINTIFF HAS BROUGHT FORTH MATERIAL FACTS EVIDENCING A VIOLATION OF THE LMRDA BY THE DEFENDANT UNION.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| Lynn L. Breininger, | ) | |
| | ) | |
| Plaintiff, | ) | Case No. C 83-1126 |
| | ) | |
| vs. | ) | Judge Nicholas Walinski |
| | ) | |
| Sheet Metal Workers | ) | NOTICE OF APPEAL |
| International Association, | ) | |
| Local Union No. 6, | ) | (Filed March 10, 1987) |
| | ) | |
| Defendant | ) | |

Notice is hereby given that Lynn L. Breininger, plaintiff above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment granting the defendant's Motion for Summary Judgment and dismissing Plaintiff's Complaint entered in this action the 23rd day of February, 1987 based upon the Opinion and Order dated and filed on February 20, 1987.

Respectfully submitted,

/s/ Francis J. Landry
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was mailed this 10th day of March, 1987 by ordinary U.S. Mail to Jeffrey Julius, Esq., Gallon, Kalniz & Iorio Co., L.P.A., 3161 North Republic Blvd., P.O. Box 7417, Toledo, Ohio 43615, attorney for defendant, Sheet Metal Workers' International Association, Local Union No. 6.

/s/ Francis J. Landry
Francis J. Landry

FJL/cap
3/6/87